In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1793

STEVEN CHARLES SANDERS,
Petitioner,

vs.

STATE OF KANSAS,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE KANSAS SUPREME COURT

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TO: THE HONORABLE CHIEF JUSTICE and ASSOCIATE JUSTICES OF THE UNITED STATES SUPREME COURT:

Petitioner, Steven Charles Sanders, prays for a Writ of Certiorari, to review the judgment of the Kansas Supreme Court, which affirmed the judgment of the District Court of Wyandotte County, Kansas, in sentencing the Petitioner to the custody of the Secretary of Penal Institutions for a period of not less than one (1) nor more than ten (10) years, pursuant to K.S.A. 1974 Supp. 65-4127(b), K.S.A. 1974 Supp. 21-4501(d), and K.S.A. 1974 Supp. 21-4503(b).

OPINION BELOW

The trial court, District Court of Wyandotte County, Kansas, overruled the Petitioner's pre-trial Motion to Suppress along with the Petitioner's objections to the items seized at the time they were offered during the course of the Petitioner's trial herein, said objection being prefaced on the Petitioner's pre-trial Motion to Suppress, at the conclusion of the Petitioner's trial to the Court, the Court finding the Petitioner GUILTY of the one count remaining in the Information alleging a violation of K.S.A. 1974 Supp. 65-4127(b). On appeal, the Kansas Supreme Court affirmed the District Court's judgment on April 9, 1977, further denying the Petitioner's Motion for Rehearing on May 18, 1977, however, afforded the Petitioner a thirty (30) day stay of the Court's mandate herein conditioned on the Petitioner petitioning this Honorable Court for Certiorari. The decision of the Kansas Supreme Court is not as yet reported; however, the decision along with the Court's Stay Order are attached hereto as Appendices A and B.

JURISDICTION

The jurisdiction of this Honorable Court is invoked under 28 U.S.C. Sec. 1257(3), along with the Court's Rules 27, 50, and 51.

The Federal Constitutional questions sought to be reviewed by this Court, were developed, raised, and reraised in all Courts below, by the Petitioner's Motion to Suppress, New Trial, Appeal, and Motion for Rehearing, which were all denied as is more fully evidenced in the Petitioner's trial record and the Kansas Supreme Court's Opinion herein. (R. 5, 8, 10, 11, 12, 15) (A4, A9).

In addition, the issues sought to be reviewed herein are of the greatest constitutional importance, in that all of the Federal Circuit Courts have determined, in opposition to the Kansas Court's Opinion that if the false representations were intentionally made, suppression is required; the highest courts of nineteen sister states have additionally determined this issue in opposition to the Court's Opinion, eleven sister states have taken the same position as announced by this Court; however, two of these jurisdictions have been overruled by the Federal Courts. The balance of the State Courts have either not ruled on this issue, been squarely faced with same, or readily appear to be leaning toward allowing inquiry as to falsity. The Petitioner herein would have developed additional substantiation, if allowed to call the witnesses who were in attendance to the Court at the time the Court heard the evidence and argument in relation to his Motion to Suppress. (R. 8).

In an attempt to minimize my expanse herein, I will attempt to confine my position, in all deference and respect, to those areas of the Kansas Supreme Court's Opinion that I feel are clearly erroneous and are in further conflict with the Court's own decisions.

QUESTIONS PRESENTED

Two Federal Constitutional questions of exceeding importance are presented in this case for determination by this Honorable Court:

(a) The purported Affidavit, the only evidence presented for the issuance of the Search Warrant herein, was grossly insufficient to establish hopeful cause, let alone

probable cause, as required by the Fourth Amendment to the United States Constitution.

(b) The Petitioner in making a prima facie showing of material false representation of fact by the Affiant was entitled to suppression and in addition, the Court's failure to allow the Petitioner to present additional evidence to support this issue was a rank violation of DUE PROCESS.

STATUTES INVOLVED

The Fourth Amendment to the United States Constitution (U.S. Const. Amend. IV) provides:

> "The right of the people to be secure in either house, person, papers and effects, against unreasonable searches and seizure, shall not be violated, and no warrant shall issue, but upon probable cause, supported by oath or affirmation and particularly describing the place to be searched and persons or things to be seized."

Kansas Statutes Annotated 22-3216(2), the pertinent portions of same being as follows:

> "The motion shall be in writing and state facts showing wherein the search and seizure were unlawful. The judge shall receive evidence on any issue of fact necessary to determine the motion and the burden of proving that the search and seizure were lawful shall be on the prosecution."

STATEMENT OF THE CASE

The Petitioner was charged by Information on June 23, 1974, alleging in the first count that Petitioner possessed heroin, in violation of K.S.A. 65-4127(a); the second count alleged that Petitioner possessed cocaine, in violation of K.S.A. 65-4127(a); the third count alleged that the Petitioner possessed marijuana with intent to sell, in violation of K.S.A. 65-4127(b); and the fourth count alleged that Petitioner possessed psilocybin with intent to sell, in violation of K.S.A. 65-4127(b). (R. 2, 3). The matter came on for trial pursuant to a "Stipulation of Fact". (R. 8). The terms of the stipulation reveal that the State and Petitioner waived a trial by jury, the Court consented to the said waiver. (R. 8). The stipulation further provided for the dismissal, at the State's request, of Counts I, II, and IV of the Information. (R. 9). Thus, the only count which remained to be tried by the Court was Count III, being the charge relating to the possession of cannabis sativa L., commonly known as marijuana with intent to sell, in violation of K.S.A. 65-4127(b). (R. 9). The Court accepted the written Stipulation of Fact, pursuant to Supreme Court Rule 112, and upon review of said facts found the Petitioner guilty of the one count remaining in the amended Information. (R. 14).

On January 30, 1975, Petitioner filed with the Magistrate Court of Wyandotte County, Kansas, a Motion to Suppress any and all evidence seized during a search of his residence at 35 South 15th Street, Kansas City, Kansas. The Petitioner's Motion sought review of the legality of the search and seizure which was accomplished under the apparent authority of a search warrant issued May 12, 1974. Petitioner's Motion sought the review of the sufficiency of the Affidavit filed by Jack L. Hartman in

support of the Search Warrant and further Petitioner sought review of the issuance of the Search Warrant in light of certain falsities appearing on the face of the Affidavit. The Affidavit for the Search Warrant provided as follows:

AFFIDAVIT FOR SEARCH WARRANT

"Before Cordell D. Meeks, Judge of the District Court, Wyandotte County Courthouse, Kansas City, Kansas:

The undersigned being duly sworn deposes and says:

That he has reason to believe that on the premises known as 35 South 15th Street (upstairs apt.) in the Wyandotte District of Kansas, there is now being concealed certain property, namely Cannabis Sativa L., (commonly known as Marijuana), Cocaine, and Heroin which are illegal for possession by the Uniform Controlled Substance Act, K.S.A. 65-4105.

And that the facts tending to establish the foregoing grounds for issuance of a Search Warrant are as follows: The assigning officer swears and affirms that he has information from a confidential informant, who he has known for several months who has given him information in the past that has proven to be correct, that at the above address is secreted Heroin and Cocaine in one ounce lots and Marijuana in one pound lots. The confidential informant states that this is the residence of Steve Sanders, and he has purchased the above-mentioned items within the last 24 hours.

/s/ Jack L. Hartman
Special Agent, A. G. Office"

Testimony of the Affiant, Jack Hartman, was heard on July 18, 1974, during the course of the Preliminary Hearing before the Magistrate Court of Wyandotte County. (R. 6). Jack Hartman testified that he had known the confidential informant, Mickey Harris, for fifteen days prior to May 12, 1974. (R. 6). He met Harris in the Wyandotte County Jail on April 27, 1974, when he and another agent, John Echart, made certain promises and commitments for information. (R. 6). Mr. Hartman further testified that the informant, Harris, provided Hartman with information on two or three occasions; however, the information did not prove out. (R. 7). Harris' information to Hartman was obtained on one occasion before the Search Warrant was obtained herein, but that information also did not prove out. (R. 7, 21).

Inquiry was then made concerning exactly what information was imparted to him by the informer, Harris. In this regard, Hartman testified that he had no recollection whether the informant had told him he had been up to the house, or if he was just at the door. (R. 7). Further, the witness guessed that Mickey Harris had been over to the house a couple of times before. (R. 7). Hartman's testimony further reflected that the alleged sale consummated at Sanders' residence consisted of one gram of heroin; however, the purchaser being expanded from the informant, Mickey Harris, to the informant and one Eddie Stewart. (R. 7). The record further shows that Stewart was the actual provider of information to Mickey Harris because Hartman testified Harris stated, "It is where Stewart bought all of his marjuana and Mickey knew it, and Mickey told me that." (R. 7, 23). Further, Hartman attributed the following statement to Harris: "He took Eddie Stewart over there and they purchased one gram of heroin." (R. 7).

In addition, Hartman testified that the Affidavit submitted in relation to obtaining the Search Warrant was compiled with a blank form obtained from the Kansas City, Kansas Police Department in the late evening of May 11, 1974. (R. 7). Hartman did not prepare the Affidavit as viewed in the "blank form". The Affidavit was prepared from information he provided. (R. 7, 19). After the Affidavit was completed from the information provided, he read and executed the Affidavit. (R. 7). Hartman testified that there was at least one word in the Affidavit he didn't understand and he further conceded mistakes existed in the Affidavit. (R. 7, 19).

Prior to trial in the District Court, Petitioner filed a pre-trial Motion to Suppress the evidence seized at his residence. (R. 5). The Petitioner's Motion to Suppress was twofold: (1) that the Affidavit contained insufficient and incomplete information to justify the issuing of a Search Warrant; and (2) that the Affidavit submitted to obtain the Search Warrant contained false and misleading information. (R. 5, 6). The Petitioner's Motion to Suppress was argued on April 3, 1975, and the stenographic transcript of the Petitioner's Preliminary Hearing was admitted by Stipulation of Fact for the sole purpose of showing Hartman's false material representation of fact. (R. 10). The Petitioner also had other witnesses in attendance in the Court on April 3, 1975, to testify to the material false representation. (R. 10). The Court, however, refused to hear any testimony from the witnesses on this issue. (R. 8, 10). The Petitioner on April 11, 1975, filed an Offer of Proof by which Petitioner submitted he is prepared to present additional evidence to the Court which would show the material falsity of the Affiant's Affidavit. The Offer of Proof was as follows:

> "That the confidential informant, Mickey Harris, alluded to in Hartman's Affidavit has never been at the residence attributable to the Defendant, 35 South 15th Street (upstairs apartment), Kansas City, Kansas, within 24 hours from the date the Affiant executed the Affidavit, May 12, 1974, or for that matter, at any point. In addition, the evidence will disclose that at no point has the confidential informant, by himself or acting in league with anyone, purchased any type of item, be it information or contraband, from the Defendant herein." (R. 9).

After the above-described tertiary hearing on the Motion, the Motion was overruled on April 16, 1975. (R. 9). The Court finding in relation to Hartman's Affidavit:

> "The Court found in relation to Hartman's Affidavit, 'Frankly if this Affidavit had been presented to me, I would have found probable cause whether the man had lied or not.' " (R. 7).

Thus, the Court permitted into evidence the material removed from Petitioner's residence which was found to be marijuana. After the Court's finding and verdict of guilty on November 12, 1975, as aforesaid, the Petitioner moved for a New Trial. (R. 11). The Motion for New Trial cited as error the failure to suppress seized evidence as more fully described in the pre-trial Motion; and the failure to permit the witness present on April 3, 1975, to testify in relation to the Motion to Suppress; and more particularly, to testify to the false representations contained in Mr. Hartman's Affidavit. (R. 11). Petitioner's claim of error was again rejected by the Court in its denial of a new trial (R. 14), and thereafter Petitioner duly perfected his appeal. (R. 15).

REASONS FOR GRANTING THE WRIT

A. The Purported Affidavit, the Only Evidence Presented for the Issuance of the Search Warrant Herein, Was Grossly Insufficient to Establish Hopeful Cause, Let Alone Probable Cause, As Required by the Fourth Amendment to the United States Constitution.

In reviewing the Affidavit of May 12, 1974, that the Kansas Supreme Court found not wanting herein (A6), even though it lacked "grammatical skill", may well describe the premises with certainty but anything asserted thereafter requires the use of mystics and imagination to determine or support its author's "tale". (R. 4). What information had previously been provided by this confidential informant that proved reliable? How was the determination of reliability made? How did the informant determine what was secreted on the premises, by sight, rumors, of the use of a crystal ball; and what was his purchase within the last twenty-four hours, that of information or drugs?

The Affidavit also must be viewed in the context that there is a complete void of any of the underlying circumstances necessary to be provided to the Court to allow the assessment of reliability of the informant. The attestations viewed are permeated with glib generalities absent detail, time or underlying circumstances as to *why*, *when* and *how* the information was received by the Affiant from the informant. Further, the Affidavit fails to indicate how the Affiant concluded the information provided was in fact correct or reliable, or for that matter, that the information provided by the informant previously was information connected to, or associated with

criminal activity. Simply, it is submitted that there were no specifics to justify the conclusion of reliability.

The Kansas Supreme Court had previously determined the requisite basis that Search Warrant Affidavits must reflect. The Court determining that the Affidavits must reflect as to how and why the informant possessed the information represented in the Affidavit and additionally must reflect the underlying circumstances to support the Affiant's conclusion that the informant is reliable or credible. It appears that the Court's Opinion herein is in diametric opposition to the Court's previously announced wisdoms. *State* v. *Hubbard*, 215 Kan. 42, 44, 523 P.2d 387, however, the Court's Opinion herein is in direct conflict with this Honorable Court's announced wisdoms. *Aguilar* v. *Texas*, 378 U.S. 108, 12 L.Ed.2d 723; *United States* v. *Ventresca*, 380 U.S. 102, 13 L.Ed.2d 684; *Giordello* v. *United States*, 357 U.S. 480, 2 L.Ed.2d 1503; *Spinelli* v. *United States*, 393 U.S. 410, 21 L.Ed.2d 637. The Kansas Supreme Court thereafter in its Opinion (A6), attempts to equate some inertia of reliability to the informant by stating that the declaration, whatever it may have been, made by the informant to Hartman was a declaration against the informant's penal interest, that is, assuming the revelation was that the informant purchased drugs. The information that was provided, absent further attestation, suggests the confidential informant was performing under Hartman's, the Affiant, direction and control (R. 20), or that he may have served as a procuring agent for Hartman. Again from the Record, Hartman talked with Harris, the informant, on April 27, 1974 (R. 6); a Search Warrant was issued on May 12, 1974 (R. 4); the Affidavit reflects that the informant purchased something, again presumably drugs, within twenty-four hours from the

time Hartman executed the Affidavit. (R. 4). Assuming this to be the case, which we must from the Record, it would render complete absolution to the informant for any criminal activity involved herein. *State* v. *Osburn,* 211 Kan. 248, 505 P.2d 742; *Garcia* v. *United States,* 373 F.2d 806 (10th Cir.); *Padilla* v. *United States,* 421 F.2d 123, 124 (10th Cir.). It would therefore be impossible to construe the admission by the informant as being contrary to his penal interest; hence, the supposed admission would not inherit reliability as a declaration against same. *United States* v. *Harris,* 403 U.S. 573, 583, 584, 29 L.Ed.2d 723, 733, 734; *Chambers* v. *Mississippi,* 410 U.S. 284, 35 L.Ed.2d 297.

B. The Petitioner in Making a Prima Facie Showing of Material False Representation of Fact by the Affiant Was Entitled to Suppression and in Addition, the Court's Failure to Allow the Petitioner to Present Additional Evidence to Support This Issue Was a Rank Violation of DUE PROCESS.

The Kansas Supreme Court's Opinion in preventing inquiry into flagrantly false Affidavits submitted to obtain a Search Warrant provides absolution and judicial immunity to those who perpetrate falsities, if we are estopped from delving into the falsities of Search Warrant Affidavits, if the Search Warrant was directed at the perpetrator.

In any event, to condone falsity to any extent on the basis of possible abuse by a defendant, is certainly an encouragement to perpetuate falsities by Affiants and necessarily makes "the Court an accomplice in the willful disobedience of a constitution they are sworn to uphold." *Elkins* v. *United States,* 364 U.S. 206, 223, 4 L.Ed.2d 1669.

In addition, the Court's Opinion further prevents a defendant, after a prima facie showing is made of a falsity, from providing the evidence of a falsity and further condones denial of the Petitioner's right to present his evidence in relation thereto, a more flagrant violation of DUE PROCESS, I cannot imagine. The Kansas Supreme Court has effectively condoned suppression of material, relevant, and cogent evidence of falsity to be elicited by the Petitioner herein. *Giglio* v. *United States,* 405 U.S. 150, 154, 31 L.Ed. 2d 104; misrepresentation in this regard is always minimally relevant. *Jones* v. *United States,* 362 U.S. 257, 271, 4 L.Ed.2d 697, 708. In determining the existence of a Fourth Amendment violation, federal courts are required and must make independent inquiry in relation thereto. *Elkins,* id. 224. *Jenkins* v. *McKeithen,* 395 U.S. 411, 23 L.Ed.2d 404; *Nardone* v. *United States,* 308 U.S. 338, 341, 84 L.Ed. 307; *Hoffritz* v. *United States,* 240 F.2d 109, 112 (9th Cir. 1956); *Battle* v. *United States,* 345 F.2d 438, 440 (D.C. Cir. 1965).

The peripheral inaccuracies or misrepresentations allowing this Honorable Court to conclude did not affect the integrity in the Affidavit in *Rugendorf* v. *United States,* 376 U.S. 528, 11 L.Ed.2d 887, are clearly not found herein, as Hartman's distortions and falsehoods that the Petitioner managed to establish are several in number and clearly reflected in the Record herein at pages 6 and 7. In addition, if the informant had purchased drugs from the Petitioner as represented by Hartman in the Affidavit (R. 4), on May 11, 1974 or May 10, 1974, why was the Petitioner not charged with this violation, or where are the fruits of the purchase? It is exceedingly unfortunate that the Petitioner was unable to explore this line of inquiry.

The Petitioner's Offer of Proof (R. 8), was prefaced on witnesses who were in attendance to the Trial Court to testify in relation to the Petitioner's Motion to Suppress, and may well have solved this riddle, as the witness was Eddie Stewart, the informant's informant, Hartman's second confidant (R. 7, 23), along with Affiant Hartman.

The Kansas Supreme Court further concluded in its Opinion that if the "attacked rule" were allowed that Hartman's distortions were peripheral in nature, not material and further fell short of destroying the Affidavit's integrity. (A13). The Kansas Supreme Court's determination herein unfortunately came to pass even though the Petitioner was foreclosed from introducing evidence in support of his announced position.

The culmination of intentional material false representations readily appears in the Record herein, at pages 6, 7, and 19-24; in making this judicial determination as stated in the Record, it would appear the following material issues must be resolved. How could the Affiant describe with such particularity the drugs secreted on the Petitioner's premises (R. 4), when the Affiant was never in the residence (R. 7), and the Affiant wasn't sure whether the informant was. (R. 7, 23).

The information provided *by the informant did not prove out* (R. 21), one lead was provided the Affiant before the issuance of the Search Warrant, one subsequent thereto. (R. 21). However, Hartman's subsequent testimony reflects that the lead provided prior to the Search Warrant allowed the Affiant to purchase drugs from a vendor that he cannot find. (R. 22). His acquaintance with the informant was fifteen (15) days, not several months. (R. 6).

We have information coming from two sources, the informant and a third party, with attestation of supposed reliability being directed by the Affiant solely to the informant. (R. 7, 23).

The materiality and intentional misrepresentation viewed may further be seen if the Affidavit were corrected to speak the truth, the material portion of same would thereafter reflect as follows:

> I have not been in the residence described herein, and I am not sure my informant was, however, drugs are secreted therein. My informant has provided correct information in the past in that he provided me with information that allowed me to purchase drugs from a vendor I can't find. I have known the informant some fifteen days and some of the information provided by the informant comes from a third party source. My informant purchased the above items within the last twenty-four hours; however, I am not positioned to state the present location of his purchase. However, I don't desire to prosecute the vendor in relation to same.

The materiality of the intentional falsities thence becomes unassailable by making but one query, who amongst us would issue a Search Warrant based on the corrected Affidavit?

There is little question that narcotic informant's credibility may often be suspect. *Jaben* v. *United States,* 318 U.S. 214, 223, 224, 14 L.Ed.2d 345. In addition, I think there is little question that a Defendant may challenge the credibility and reliability of an informer whose information is utilized by a peace officer seeking a Search

Warrant. *Aguilar* v. *Texas,* 378 U.S. 108, 12 L.Ed.2d 723; *Spinelli* v. *United States,* 393 U.S. 410, 21 L.Ed.2d 637.

If this Honorable Court permits us to challenge informant information, but were to deny us the right to make inquiry of the Affiant's attestations in relation thereto, then how could we determine the basis of the Affiant or his informant's conclusions as represented in Search Warrant Affidavits? To deny this avenue of exploration is to deny both avenues of inquiry.

The Kansas Supreme Court in its Opinion feels without expressed statutory authority that inquiry into the contents of the Affidavit is not allowable, Kansas in providing the tools to challenge the legality of a search or seizure has adopted legislation from the Montana Code 95-1805 as viewed in K.S.A. 22-3216(2), the pertinent portions of same being as follows:

> "The motion shall be in writing and state facts showing wherein the search and seizure were unlawful. The judge shall receive evidence on any issue of fact necessary to determine the motion and the burden of proving that the search and seizure were lawful shall be on the prosecution."

The Montana Supreme Court has concluded that material false representation of fact in Search Warrant Affidavits most assuredly merits inquiry. *State* v. *Manoff,* 160 Mont. 344, 502 P.2d 1138 (1972).

In further reviewing the Kansas Supreme Court's Opinion, I note the parties' stipulation entered into herein, pursuant to the Kansas Supreme Court's Rule 112, as set out in the Court's Opinion. (A2-A4). The Kansas Supreme Court's Opinion further reflected and found that

the Trial Court accepted the stipulation of the parties hereto. (A4). The stipulation, in part, allowed the admission of evidence in support of the Petitioner's position that the Affidavit contained material false representation of fact.

The stipulation further reflected that the Trial Court was not inclined to allow testimony from witnesses in further support of this issue. (A4).

The Kansas Supreme Court's Opinion, however, fails to determine how the stipulation entered into by the parties hereto, that was accepted by the Trial Court, was not binding on the Trial Court and justified the Trial Court in refusing thereafter to allow the Petitioner to present testimony in further support of the central issue of the accepted stipulation. Would this appear to be equal application of the existing precedent? *State* v. *Gordon,* 219 Kan. 643, 651, 549 P.2d 886; *United States* v. *Payne,* 474 F.2d 603 (10th Cir. 1973).

As we have previously called to the Court's attention, *all* federal circuits have agreed that an attack may be made, on falsities in Search Warrant Affidavits, although some have not decided what standards should be used. E.g., *United States* v. *Belcufine,* 508 F.2d 58 (1st Cir. 1974); *United States* v. *Gonzales,* 488 F.2d 833 (2nd Cir. 1973); *United States* v. *Damitz,* 495 F.2d 50 (9th Cir. 1974); *United States* v. *Thornton,* 454 F.2d 957 (D.C. Cir. 1971). The Fourth, Sixth, Seventh, and Eighth Circuits will invalidate warrants where procured by (1) any intentional misrepresentation or (2) a material reckless misrepresentation. *United States* v. *Lee,* 540 F.2d 1205 (4th Cir. 1976); *United States* v. *Luna,* 525 F.2d 4 (6th Cir. 1975), *cert. denied,* 424 U.S. 965, 41 L.Ed.2d 732, 96 S.Ct. 1459 (1976); *United*

States v. *Carmichael*, 489 F.2d 983 (7th Cir. 1973); *United States* v. *Marihart*, 492 F.2d 897 (8th Cir. 1974). The Fifth Circuit invalidates warrants procured by (1) any intentional misrepresentation or (2) any material misrepresentation. *United States* v. *Thomas*, 489 F.2d 664 (5th Cir. 1973). The Tenth Circuit invalidates any warrant procured by material misrepresentations. *United States* v. *Harwood*, 470 F.2d 322 (10th Cir. 1972).

The following twenty states additionally permit inquiry in this regard:

McConnell v. *State*, 48 Ala.App. 523, 266 So.2d 328, *cert. denied*, 289 Ala. 746, 266 So.2d 334 (1972), Alabama;

State v. *Davenport*, 510 P.2d 78 (1973), Alaska;

State v. *Sabari*, 109 Ariz. 553, 514 P.2d 474 (1973) (dictum), Arizona; and

State v. *Payne*, 25 Ariz.App. 454, 544 P.2d 671 (1976), Arizona;

Theodor v. *Superior Court of Orange County*, 104 Cal. Rptr. 226, 501 P.2d 234 (1972) (by statute), California;

People v. *Martin*, 527 P.2d 806 (1974), Colorado;

State v. *Jacobs*, Fla.App., 320 So.2d 45 (1975), Florida;

William v. *State*, 232 Ga. 213, 205 S.E.2d 859 (1974), Georgia;

State v. *Boyd*, Iowa, 224 N.W.2d 609 (1974), Iowa;

State v. *Mielson*, La., 284 So.2d 873 (1973), Louisiana;

Commonwealth v. *Rugaber*, ... Mass. ....., 343 N.E.2d 865 (1976), Massachusetts;

People v. *Broils*, 58 Mich.App. 547, 228 N.W.2d 456 (1975), Michigan;

State v. *Luciow*, ... Minn. ....., 240 N.W.2d 833 (1976), Minnesota;

State v. *Baca*, 84 N.M. 513, 505 P.2d 856 (1976), New Mexico;

People v. *Alfinito*, 16 N.Y.2d 181, 264 N.Y.S.2d 243, 211 N.E.2d 644 (1965), New York;

Wright v. *State*, Okla.Cr., 552 P.2d 1157 (1976), Oklahoma;

State v. *Wright*, Or., 511 P.2d 1223 (1973) (by statute), Oregon;

Commonwealth v. *Hall*, 451 Pa. 201, 302 A.2d 342 (1973), Pennsylvania;

State v. *Sachs*, 264 S.C. 541, 216 S.E.2d 501 (1975), South Carolina;

State v. *Bankhead*, 30 Utah2d 135, 514 P.2d 800 (1973) (by statute), Utah; and

State v. *Goodlow*, 11 Wash.App. 533, 523 P.2d 1205 (1974), Washington.

In at least two states, the question has been left undecided. *State* v. *Breest*, ... N.H. ....., 367 A.2d 1320, 1329 (1976); *State* v. *Appleton*, ... Me. ....., 297 A.2d 363, 367 n.1 (1972). Furthermore, two states formerly thought to support the rule are now subject to doubt. Compare *Seager* v. *State*, 200 Ind. 579, 164 N.E. 274 (1928) with *Grzesiowski* v. *State*, ... Ind.App. ....., 343 N.E.2d 305 (1976) (recognizing rule by implication). Most interestingly, Montana, from whom our Motion to Suppress statute, K.S.A. 22-3216, was borrowed, appears to have overruled sub silentio an earlier case which held that a facially valid warrant could not be subsequently impeached. In *State* v. *Manoff*, 160 Mont. 344, 502 P.2d

1138 (1972), without referring to *State* v. *English*, 71 Mont. 343, 229 Pac. 727 (1924), the Montana Court held:

> "It is clear that erroneous information was given to the district judge, and that this information provided the evidence upon which the warrant was issued. We cannot uphold warrants which are not based on probable cause, and probable cause cannot be established by the use of incorrect information."

The following twelve states hold that Search Warrant Affidavits may not be challenged:

Powell v. *State*, ... Ark. ....., 540 S.W.2d 1 (1976), Arkansas;

State v. *Williams*, 160 Conn. 322, 363 A.2d 71 (1975), Connecticut;

People v. *Bak*, 45 Ill.2d 140, 258 N.E.2d 341, *cert. denied*, 400 U.S. 882, 27 L.Ed.2d 121, 91 S.Ct. 117 (1970), Illinois;

State v. *Lamb*, 209 Kan. 453, 497 P.2d 275 (1972), Kansas;

Berkshire v. *Commonwealth*, ... Ky. ....., 471 S.W.2d 695 (1971), Kentucky;

Wood v. *State*, ... Miss. ....., 322 So.2d 462 (1975), Mississippi;

State v. *Brugioni*, 320 Mo. 202, 7 S.W.2d 262 (1928), Missouri;

State v. *Harris*, 25 N.C.App. 404, 213 S.E.2d 414, *cert. denied*, 287 N.C. 666, 216 S.E.2d 909 (1975);

State v. *Petillo*, 61 N.J. 165, 293 A.2d 649 (1972), *cert. denied*, 410 U.S. 944, 35 L.Ed.2d 611, 93 S.Ct. 1393 (1973), New Jersey;

State v. *Seymour*, 46 R.I. 257, 126 Atl. 755 (1924), partially overruled on oath grounds, *State* v. *LeBlanc*, 100 R.I. 523, 217 A.2d 471 (1966), Rhode Island;

Owens v. *State*, 217 Tenn. 544, 399 S.W.2d 507 (1965), Tennessee; and

Barnes v. *State*, Tex.Crim.App., 520 S.W.2d 401 (1975), Texas.

It is noteworthy that federal courts in New Jersey and North Carolina have granted relief to Petitioners, on habeas corpus, wherein state courts have refused to grant relief in attempting to challenge material false representation of fact in Search Warrant Affidavits. *United States, ex rel. Petillo* v. *New Jersey*, 400 F.Supp. 1152 (D.N.J. 1975), *vacated per curiam*, 541 F.2d 275 (3rd Cir.), on remand, 418 F.Supp. 686 (1976); *Wrenn* v. *North Carolina*, No. 72-2176 (E.D.N.C., 11/5/73), *aff'd per curiam*, 486 F.2d 1399 (4th Cir. 1973), *cert. denied*, 417 U.S. 973, 41 L.Ed.2d 1144, 94 S.Ct. 3180 (1974) (White, J. and Burger, C. J., dissenting).

It is of exceeding interest that the Kansas Supreme Court on April 9, 1977, additionally handed down its Opinion in *State* v. *Ames*, No. 48,366; the Opinion is not reported at this point, however, is reproduced herein in Appendix C. The Court concluded in the *Ames* decision that the statements made by the Affiant in a Search Warrant Affidavit, even though based on the Affiant's personal observation, save the address of the Appellant's wife, which was hearsay. The hearsay nature of the latter statement was not disclosed to the issuing magistrate.

The Court thereafter concluded that this point was raised by the Appellant at the suppression hearing before trial. "In its ruling on the Motion to Suppress, the District Court stated that if the Warrant had been issued on a finding of probable cause, based on material written statements under oath that were later shown to be untrue, items seized should be suppressed. Evidence at the suppression hearing, however, showed the sworn statement was true. Should the items seized be suppressed anyway because hearsay was involved and there was no finding based upon the two-pronged test of *Aguilar*? The District Court answered this question in the negative. It reasoned that warrants may be based on hearsay, and where the hearsay statements are true and are of the nature of the statements in this case, the evidence seized should not be suppressed. *We agree with the District Court.* The hearsay involved in this case did not affect the magistrate's probable cause determination. Failure to comply with the *Aguilar* requirement does not mandate suppression under the instant facts." (A15, A21). The Kansas Supreme Court therefore appears to employ a two-prong test in determining whether false representations of fact in Search Warrant Affidavits allow for inquiry in relation thereto. The obvious difficulty is determining which of the two prongs affords the Appellant the right to make such inquiry.

In addition, it readily appears that this Honorable Court demands disclosure, not suppression, and further exacts appropriate penalties for falsity of any nature as false testimony readily violates DUE PROCESS. *Giglio* v. *United States,* 405 U.S. 150, 154, 31 L.Ed.2d 104; compare *Goldberg* v. *United States,* 422 U.S. 94, 47 L.Ed.2d 603.

CONCLUSION

To sustain Hartman's Affidavit herein as justifying the needed verbiage for a finding of probable cause, would require the elimination of both this Honorable Court's eyes and ears.

It would further necessitate the Court to stamp its approval and to condone perjury as to information so critically inaccurate as to raise the spectre of the prosecution and to condone conviction of the innocent.

It would further require this Honorable Court to deny the existing precedent of every federal circuit court of appeals and to repudiate their announced wisdoms. This practice necessarily would deny STARE DECISIS, along with the annihilation of the Fourth and Fifth Amendments to the United States Constitution, reducing jurisprudence to the "shifting sands of time"; impossible to find, seldom repeated, ever-changing, and always subject to the whim of its Divine Provider. The Petitioner therefore respectfully urges this Honorable Court to grant his Petition for Writ of Certiorari.

Very respectfully submitted,

JOHN C. HUMPAGE
314 West Seventh Street
Topeka, Kansas 66603
Phone: (913) 235-5351
Attorney for Petitioner

APPENDIX A

No. 48,484

4/9/77

STATE OF KANSAS,
Appellee,
vs.
STEVEN CHARLES SANDERS,
Appellant.

SYLLABUS BY THE COURT

1.

Before a search warrant may be validly issued there must be presented before the issuing magistrate sufficient facts to enable him to make an intelligent and independent determination that probable cause exists.

2.

While an affidavit to support the issuance of a search warrant may be based on hearsay, there must be adequate affirmative allegations of the affiant's personal knowledge of the information provided, to provide a rational basis upon which the issuing magistrate can make a finding of probable cause.

3.

It is generally held that in the absence of statutory authority to the contrary a party against whom a search warrant is directed may not dispute the matters alleged in the supporting affidavit or complaint. (Following *State* v. *Wheeler*, 215 Kan. 94, Syl. 4, 523 P. 2d 722.)

Appeal from Wyandotte district court, division No. 3; HARRY G. MILLER, judge. Opinion filed April 9, 1977. Affirmed.

John C. Humpage, of Topeka, argued the cause and was on the brief for the appellant.

Zygmunt Jarczyk, Assistant District Attorney, argued the cause, and *Curt T. Schneider,* Attorney General, *Nick A. Tomasic,* District Attorney, and *Dennis L. Harris,* Assistant District Attorney, were on the brief for the appellee.

The opinion of the court was delivered by

KAUL, J.:

Defendant-appellant, Steven Charles Sanders, appeals from a conviction, in a trial to the court, of possession of Cannabis Sativa L. (marijuana) with the intent to sell in violation of K. S. A. 1976 Supp. 65-4127b. The central issue involves the sufficiency of an affidavit upon which a search warrant was issued.

The search warrant in question was issued by the judge of division No. 6 of the Wyandotte district court on May 12, 1974. As a result of the execution of the search warrant quantities of narcotic drugs were seized at the residence of the defendant and a four count information was filed against him. Three counts were later dismissed. Prior to the scheduled date for a preliminary hearing, defendant filed, in the magistrate court, a motion to suppress the evidence seized in the execution of the warrant. After an evidentiary hearing before the magistrate, defendant's motion to suppress was denied, and thereupon defendant waived preliminary hearing and was bound over for trial to the district court.

In the district court, defendant filed a second pretrial motion to suppress the evidence on essentially the same grounds as alleged in his first motion. After a hearing before the district court, defendant's motion was again denied. Thereupon, the parties stipulated that a trial by jury would be waived, the state dismissed three counts of the information, and it was further stipulated and agreed that the case would be submitted to the district court upon a stipulation of facts which reads in pertinent part:

> "THAT IT IS STIPULATED BY THE PARTIES hereto that the Defendant was an occupant of the premises at 35 South 15th Street (upstairs apartment), Kansas City, Kansas, on May 12, 1974.
>
> "IT IS FURTHER STIPULATED AND AGREED BY THE PARTIES HERETO that the authorities gained entry to said premises on May 12, 1974, on the basis of a Search Warrant issued by the Honorable Cordell Meeks, Judge of the Wyandotte County District Court, Division No. 6, on May 12, 1974, said Search Warrant to be admitted into evidence herein and marked as Defendant's Exhibit 'A'. The Search Warrant issued on the basis of an Affidavit submitted by Jack Hartman, Special Agent, Attorney General's Office, on May 12, 1974, said Affidavit to be admitted into evidence and marked Defendant's Exhibit 'B'.
>
> "THE PARTIES ADDITIONALLY STIPULATE that as a result of the execution of the Search Warrant herein, the Officers removed from the Defendant's premises '32 large packages' of green vegetation, same marked as the State's Exhibit 1, which has additionally been analyzed by a forensic chemist and the chemist's testimony would reflect that the green vege-

tation, the '32 large packages', possessed the properties of Cannabis Sativa L. and serves as the basis of the prosecution herein.

"THE PARTIES AGREE AND STIPULATE FURTHER that at the time of the State's offer of its Exhibit 1 into evidence herein, the Defendant would renew his objection to its introduction for the reasons more fully set out in the Defendant's Pretrial Motion to Suppress and Memorandum filed in support thereof, same being overruled by the Court on April 16, 1975.

"THE PARTIES FURTHER STIPULATE that the transcript of the Defendant's Preliminary Hearing, same being conducted by the Magistrate Court of Wyandotte County, Kansas, on July 18, 1974, for the *sole purpose* of presenting the issue of material false representation of fact, the issue being readily raised in the Defendant's Motion to Suppress, should be admitted into evidence for this purpose and marked Defendant's Exhibit 'C'.

"IT IS ADDITIONALLY AND FURTHER STIPULATED AND AGREED BY AND BETWEEN THE PARTIES HERETO that the Defendant had witnesses in attendance to the Court on April 3, 1975, to testify in relation to the issue of material false representation of fact that the Defendant raised in his Motion to Suppress; however, the Court was not inclined to hear any of the testimony from the witnesses on this issue."

The court accepted the stipulation and admitted the evidence as stipulated and after considering the same found the defendant guilty as charged in the remaining count. After a motion for a new trial was denied, this appeal was perfected.

The points raised by defendant all go to the validity of the search warrant and the sufficiency of the supporting affidavit upon which the issuing judge relied. Defendant's argument on his first point goes to the sufficiency of the information contained in the affidavit for search warrant signed by Jack L. Hartman, a special agent for the attorney general's office.

The affidavit reads in material part:

"The undersigned being duly sworn deposes and says:

"That he has reason to believe that on the premises known as 35 South 15th Street (upstairs apt.) in the Wyandotte District of Kansas, there is now being concealed certain property, namely Cannabis Sativa L. (commonly known as Marijuana) Cocaine, and Heroin which are illegal for possession by the Uniform Control Substance Act, K. S. A. 65-4105.

"And that the facts tending to establish the foregoing grounds for issuance of a Search Warrant are as follows: The assigning Officer swears and affirms that he has information from a confidential informant, who he has known for *several months* who has given him information in the past that has proven to be correct, that at the above address is secreted Heroin and Cocaine in one ounce lots and Marijuana in one pound lots. The confidential informant states that this is the residence of Steve Sanders, and he has purchased the above mentioned items within the last 24 hours.

"/s/ Jack L. Hartman
"Special Agent, A.G. Office."

(Emphasis supplied.)

While the affidavit is not drawn with grammatical skill, it is sufficient on its face. It describes the premises and subject property of the search with certainty and identifies defendant as being the resident. The critical information is hearsay obtained from an unnamed informant; however, reliability is shown by the statement that previous information received proved to be correct and more importantly the affidavit states that informant had purchased illegal drugs within the previous 24-hour period. The last statement is an admission by the informant against his criminal interest.

Principles governing the determination whether a search warrant was validly issued, enunciated by the United States Supreme Court in leading cases on the subject, were analyzed and the precedents therein were adopted by this court in *State* v. *Hart,* 200 Kan. 153, 434 P. 2d 999, wherein we said:

> "We are mindful of what has been said in *Nathanson* v. *United States,* 290 U. S. 41, 78 L. Ed. 159, 54 S. Ct. 11; *Giordenello* v. *United States,* 357 U. S. 480, 2 L. Ed. 2d 1503, 78 S. Ct. 1245; and *Aguilar* v. *Texas,* 378 U. S. 108, 12 L. Ed. 2d 723, 84 S. Ct. 1509; and we recognize the precedent established by those cases. The import of those decisions, as we read them, is that before a search warrant may validly be issued, there must have been placed before the issuing magistrate sufficient facts to enable him to make an intelligent and independent determination that probable cause exists; that bald conclusions or mere affirmations of belief or suspicion are not enough; and while an affidavit may be based on hearsay, there must be sufficient affirmative allegations as to the affiant's personal knowledge or his knowledge concerning his informant, or as to the informant's personal knowledge of the things about which the informant spoke, to provide a rational basis upon which the magistrate can make a judicious determination of probable cause." (p. 162.)

The requirements for the issuance of a state search warrant based on hearsay, set forth in *Aguilar* v. *Texas,* 378 U. S. 108, 12 L. Ed. 2d 723, 84 S. Ct. 1509, were further considered by this court in *State* v. *Hubbard,* 215 Kan. 42, 523 P. 2d 387. In *Hubbard,* as in the case at bar, the affidavit in support of the search warrant was based largely upon hearsay. We spoke of the *Aguilar* test as being twofold with respect to the supportive strength of hearsay evidence. The first test concerns the reliability of the informant's information and the second is the requirement that the magistrate be informed of the underlying circumstances which led an affiant to believe the informant to be credible. In the instant affidavit the affiant swears that the informant has supplied information in the past which has proven to be correct. This satisfies the reliability test. Affiant's statement that a purchase was made within the last 24 hours discloses underlying circumstances which would permit the affiant to believe the informant to be credible.

The record reflects, as will be discussed later, that all of the information available to affiant was not presented. Neither full disclosure of facts at hand nor elaborate specificity are required. (*United States* v. *Ventresca,* 380 U. S. 102, 13 L. Ed. 2d 684, 85 S. Ct. 741.)

Although the court in *Spinelli* v. *United States,* 393 U. S. 410, 21 L. Ed. 2d 637, 89 S. Ct. 584, found that the affidavit therein fell short of the standards set forth in

Aguilar, it reaffirmed principles pertinent to the issue which had been enunciated in prior decisions. The court said:

> ". . . In holding as we have done, we do not retreat from the established propositions that only the probability, and not a prima facie showing, of criminal activity is the standard of probable cause, *Beck* v. *Ohio*, 379 U. S. 89, 96 (1964); that affidavits of probable cause are tested by much less rigorous standards than those governing the admissibility of evidence at trial, *McCray* v. *Illinois*, 386 U. S. 300, 311 (1967); that in judging probable cause issuing magistrates are not to be confined by niggardly limitations or by restrictions on the use of their common sense, *United States* v. *Ventresca*, 380 U. S. 102, 108 (1965); and that their determination of probable cause should be paid great deference by reviewing courts, *Jones* v. *United States*, 362 U. S. 257, 270-271 (1960). . . ." (p. 419.)

While, as we have previously indicated, the instant affidavit is not a model of literary composition, its meaning clear when read in a common sense and realistic fashion. This statement appearing in *United States* v. *Ventresca*, supra, is apropos:

> ". . . If the teachings of the Court's cases are to be followed and the constitutional policy served, affidavits for search warrants, such as the one involved here, must be tested and interpreted by magistrates and courts in a common sense and realistic fashion. They are normally drafted by nonlawyers in the midst and haste of a criminal investigation. Technical requirements of elaborate specificity once exacted under common law pleadings have no proper place in this area. A grudging or negative attitude by reviewing courts toward warrants will tend to discourage police officers from submitting their evidence to a judicial officer before acting." (p. 108.)

Reading the instant affidavit as a whole, in the context of the foregoing rules, we are satisfied there was a substantial basis for the issuing judge to conclude that narcotics were probably present in defendant's residence and that is sufficient. (*Jones* v. *United States*, 362 U. S. 257, 4 L. Ed. 2d 697, 80 S. Ct. 725, 78 A. L. R. 2d 233.) We conclude the affidavit, on its face, sufficiently established probable cause for the issuance of a warrant under the foregoing tests.

In his second point, defendant claims error in the trial court's refusal to permit defendant to submit evidence which defendant claims would show a material false representation of fact in the affidavit of special agent Hartman. Defendant strenuously argues that even if the affidavit of Hartman was facially sufficient, he was entitled to go behind the surface of the affidavit after initial showing of a misrepresentation of a material fact. In support of his position defendant relies upon *United States* v. *Carmichael*, 489 F. 2d 983 (7th Cir. 1973) and other federal cases in accord.

In answer to defendant's arguments, the state first responds by pointing out that the rule followed in this jurisdiction is that in the absence of statutory authorization a person against whom a search warrant is directed may not dispute the matters alleged in the affidavit supporting the warrant. (*State* v. *Wheeler*, 215 Kan. 94, 523 P. 2d 722; *State* v. *Lamb*, 209 Kan. 453, 497 P. 2d 275; 4

Wharton's Criminal Law and Procedure, Search and Seizure, Sec. 1545, pp. 167, 168; 5 A. L. R. 2d, Anno., p. 394; 68 Am. Jur. 2d, Searches and Seizures, Sec. 66, p. 720.) While, as defendant points out, there is some authority to the contrary (See Vols. 1-6 A. L. R. [2nd Series] Later Case Service 1976 Supp., Sec. 3, p. 73 [5 A. L. R. 2d, p. 405].), the rule of *Lamb* and *Wheeler* prevails in a majority of jurisdictions. The state of the law is summed up in 68 Am. Jur. 2d, *supra*, in these words:

> ". . . A majority of the state courts which have considered the problem have held that in the absence of statute, the matters contained in an affidavit on which a search warrant is based may not be disputed by the person against whom a warrant is directed, for the purpose of showing the invalidity of the warrant. A few state courts have taken the position that the truth or falsity of facts stated in supporting affidavits may be so disputed, and some federal cases have stated that such an attack might be permitted where the defendant makes an initial showing of falsehood." (p. 720.)

To this date, at least, the United States Supreme Court has not seen fit to directly rule upon the extent to which a court may or must permit an attack upon the supporting affidavit of a search warrant, which upon its face, establishes probable cause. The last word from the high court appears in *Rugendorf* v. *United States,* 376 U. S. 528, 11 L. Ed. 2d 887, 84 S. Ct. 825, reh. den. 377 U. S. 940, 12 L. Ed. 2d 303, 84 S. Ct. 1330, wherein Justice Clark speaking for the court said:

> ". . . This court has never passed directly on the extent to which a court may permit such examination when the search warrant is valid on its face and when

> the allegations of the underlying affidavit establish 'probable cause'; however, assuming, for the purpose of this decision, that such attack may be made, we are of the opinion that the search warrant here is valid. . . ." (pp. 531-532.)

Further in the opinion the court observed that factual inaccuracies in the affidavit which were developed by testimony, were of only peripheral relevancy to the showing of probable cause and did not go to the integrity of the affidavit.

We have examined many of the cases cited by defendant's industrious counsel. We have also considered the review of the cases on the subject and the author's comprehensive analysis of all facets of the issue in a treatise entitled "The Outwardly Sufficient Search Warrant Affidavit: What If It's False?", appearing in 19 U. C. L. A. Law Review, (1971), p. 96. With respect to federal decisions the author observes:

> "Lower federal courts are divided on the question of whether the victim of a search may contest the veracity of the facts alleged in an affidavit. Those federal courts allowing challenge have done so under provisions of Federal Rule of Criminal Procedure 41(e), or a prior statutory enactment, the Espionage Act of 1917. Other federal courts have refused to quash warrants or hear evidence tending to show falsity of the facts of affidavits once a judicial officer has determined that the warrants rest on probable cause. . . ." (pp. 104-105.)

Concerning state court decisions, the author says:

> "The majority of state courts have been wary of opening this area to potential abuse by defendants

and have, therefore, prohibited disputes of search affidavits where such documents establish probable cause on their face." (p. 106.)

Our search warrant statutes (K. S. A. 22-2501, *et seq.*, [and 1976 Supp.]), enacted in 1970, have not been amended in any manner relevant to the right of a person to dispute matters alleged in search warrant affidavits. *State* v. *Lamb,* supra, was decided in 1972 and the holding therein was restated in the identical language in paragraph (4) of the syllabus in *State* v. *Wheeler,* supra, decided in 1974.

In the absence of statutory direction we find no compelling reason to overrule our holdings in *Lamb* and *Wheeler.*

As an alternative response to defendant's contentions the state maintains that even if we were to overrule *Lamb* and *Wheeler,* the record here does not warrant suppression even under the so-called "attack rule" followed by some federal courts.

As indicated in the stipulation of the parties, when defendant's motion was first presented, prior to preliminary hearing, the magistrate, over the state's objection, granted an evidentiary hearing. Agent Hartman was examined at length. It was brought out that his statement in the affidavit that he had known the informant for "several months", was erroneous. Hartman admitted he had only known the informant for about fifteen days and indicated the discrepancy resulted from a typist's error—that he had said "several weeks" instead of months when the affidavit was drafted. Hartman's testimony revealed that he had had the residence of defendant under surveillance on several occasions and had witnessed what he described as traffic in drugs. Hartman further testified

that at least on one occasion the informant had given information which enabled Hartman to make a drug buy. The evidence reveals no intentional or deliberate misrepresentation in the affidavit as to any material matters relevant to the showing of probable cause. The factual inaccuracies stressed by defendant fall short of destroying the integrity of the affidavit. Hartman's testimony discloses that the affidavit did not reveal all of the sources of the affiant's belief, but this was unnecessary. (*State* v. *Ogden,* 210 Kan. 510, 502 P. 2d 654.)

When defendant renewed his motion to suppress before the trial court the transcript of the testimony in the magistrate's hearing was submitted to and considered by the trial court over the state's objection. A proffer of evidence made by defendant was, in effect, only a denial of the averments of the affidavit. In its ruling on defendant's motion, the trial court cited the rule of *Lamb* and *Wheeler,* but nevertheless continued:

> "Disregarding this, however, if the testimony given by the officer at the preliminary hearing is to be considered in this matter, then the entire testimony should be considered. There was testimony that Hartman knew the informant 'several weeks' and that the informant had given him information on one occasion at least that had enabled Hartman to make a buy of a controlled substance. In addition there was evidence that Hartman had had the premises of defendant under surveillance on several occasions and witnessed traffic in drugs at the premises.
>
> "After consideration, the defendant's motion to suppress is denied."

The judgment is affirmed.

APPENDIX B

IN THE
SUPREME COURT OF THE STATE OF KANSAS

No. 48,484

State of Kansas,
Appellee,

v.

Steven Charles Sanders,
Appellant.

You are hereby notified of the following action taken in the above entitled case:

Motion by Appellant for Rehearing.

Motion for Rehearing considered and DENIED, petition for stay of mandate granted for a period of 30 days from this date conditioned upon Appellant's petitioning for certiorari to the Supreme Court of the United States.

Yours very truly,

Lewis C. Carter
Clerk, Supreme Court

Date May 18, 1977

APPENDIX C

No. 48,366

STATE OF KANSAS,
Appellee,

v.

ROY EUGENE AMES,
Appellant.

SYLLABUS BY THE COURT

1.

The purpose of the constitutional requirement that search warrants particularly describe the place to be searched and the persons or property to be seized is to prevent general searches and preclude the seizure of items at the discretion of the officer executing the warrant.

2.

Searches conducted under the authority of warrants are preferred to warrantless searches. Hence, warrants and their supporting affidavits are interpreted in a common sense rather than a hypertechnical fashion so as not to discourage police officers from submitting their evidence to a judicial officer before acting. Search warrants and their supporting affidavits are presumed valid, and one attacking their validity carries the burden of persuasion.

3.

A search warrant shall not be quashed nor evidence suppressed because of technical irregularities in the warrant's execution unless the defendant demonstrates prejudice from the procedural violation.

4.

In passing on a motion for judgment of acquittal, the district court must determine whether upon the evidence, giving full play to the right of the jury to determine credibility, weigh the evidence, and draw justifiable inferences of fact, a reasonable mind might fairly conclude guilt beyond a reasonable doubt. If he concludes guilt beyond a reasonable doubt is a fairly possible result, he must deny the motion and let the jury decide the matter. If he concludes that upon the evidence there must be such a doubt in a reasonable mind, he must grant the motion. (Following *State* v. *Gustin,* 212 Kan. 475, Syl. 3, 510 P.2d 1290.)

5.

On appellate review, the question is not whether the evidence established guilt beyond a reasonable doubt, but whether the evidence was sufficient to form the basis for a reasonable inference of guilt. In making this determination, the evidence is viewed in the light most favorable to the state.

6.

A party who shows a judge is prejudiced against him has a right to have his case tried before some other judge—either a judge in some other division or district, or a judge

pro tem. But failure to timely file an affidavit alleging prejudice as required by statute (K.S.A. 20-311d and 311f) may bar the movant's obtaining a change of judge.

7.

A defendant has a constitutional right of self-representation and may defend himself without counsel when he voluntarily and intelligently elects to do so. An indigent defendant also has a constitutional right to court-appointed counsel. But a defendant cannot simultaneously assert both rights.

8.

When a defendant chooses to have counsel, the conduct of the defense of the case rests with the attorney. The decisions on what witnesses to call, whether and how to conduct cross-examination, what jurors to accept or strike, what trial motions to make, and all other strategic and tactical decisions are the exclusive province of the attorney after consultation with his client.

9.

The right of a defendant recognized as co-counsel to participate in the conduct of his defense is within the sound discretion of the district court as is the ruling on an indigent defendant's motion for change of appointed counsel.

10.

Statements of points which are neither briefed nor argued on appeal are considered abandoned.

11.

The record on appeal from a conviction for the offense of unlawful possession of a firearm is examined, and, as more fully set forth in the opinion, it is held: (1) the district court did not err (a) in admitting into evidence a gun and holster seized under a search warrant, (b) in denying the appellant's motion for discharge and for directed verdict, (c) in denying the appellant's *pro se* motion for appointment of a judge *pro tem*, (d) in limiting the appellant's participation at trial and in allowing appointed counsel the exclusive province over strategic and tactical decisions in the conduct of the defense, (e) in denying the appellant's motion for an order designating the Menninger Foundation to conduct a psychiatric examination of the appellant, and (f) in sentencing the appellant under the Habitual Criminal Act (K.S.A. 21-4504); (2) the evidence was sufficient to form a reasonable inference of guilt.

Appeal from Shawnee district court, division No. 4, ADRIAN J. ALLEN, judge. Opinion filed April 9, 1977. Affirmed.

Thomas A. Valentine, of Sloan, Listrom, Eisenbarth, Sloan and Glassman, Topeka, argued the cause and was on the brief for appellant; and *Roy E. Ames* was on the appellant's brief *pro se*.

Thomas D. Haney, assistant district attorney, argued the cause and *Curt T. Schneider*, attorney general, and *Gene M. Olander*, district attorney, were with him on the brief for appellee.

The opinion of the court was delivered by

FATZER, C. J.:

This is an appeal by defendant Roy E. Ames from a conviction by jury trial of the offense of unlawful possession of a firearm (K.S.A. 21-4204[1] [*b*]).

On April 2, 1974, a search warrant for a gun and holster at the downstairs apartment of 1616 Polk in Topeka was issued. The appellant's wife lived at this address; the appellant was in the Shawnee County Jail at the time. Officers found a revolver in a holster with the belt wrapped around the holster. Ammunition was in the belt, and live rounds were in the gun. All were seized. On August 28, 1974, an information was filed charging the appellant with the unlawful possession of a firearm with a barrel less than twelve inches long, within five years after conviction for the felony offense of burglary, in the district court of Shawnee County, Kansas. A jury trial was commenced on December 9, 1974. During noon recess on that day, jurors observed the appellant in handcuffs. A mistrial was granted. The second jury trial commenced on February 3, 1975. The state's evidence showed that on September 21, 1973, the appellant and his wife met Mary Lou Potter at Wild Willie's South in Topeka. The appellant pointed out the revolver he wanted and gave Mary the necessary cash. She bought the gun and gave it to the appellant. The evidence showed that subsequent to the purchase, the appellant used the gun for target practice and frequently practiced fast-drawing the gun in front of a mirror. Both the appellant and his wife referred to the gun as his. On February 5, 1975, the jury returned its verdict, finding the appellant guilty as charged. Following a number of post-trial motions which ultimately resulted in the district court's denying the appellant's mo-

tion for new trial, the appellant was sentenced under the Habitual Criminal Act on September 30, 1975. This appeal followed.

The appellant's first three points on appeal deal with the admission into evidence of the gun and holster seized under the search warrant. He first contends such admission was error because the affidavit in support of the search warrant was fatally defective in that it was based in part on hearsay and such fact was not disclosed to the issuing magistrate.

The affiant was one Dena Christian. She had been living with the appellant's wife until they each moved to a new address only a few days before she made her sworn statement. In preparing her affidavit at the district attorney's office, Dena was not certain of the address to which the appellant's wife had moved. She consulted the classified section in the newspaper and called the listing she thought the appellant's wife had taken. The landlady told her that the appellant's wife had rented the downstairs apartment at that address. All the statements in Dena's affidavit are based on her personal observation except the address at which she stated the appellant's wife was residing. The hearsay nature of the latter statement was not disclosed to the issuing magistrate.

In *State* v. *Hart*, 200 Kan. 153, 434 P.2d 999, this court, relying on *Aguilar* v. *Texas*, 378 U.S. 108, 12 L.Ed.2d 723, 84 S.Ct. 1509, set out the requirements for the valid issuance of a warrant:

> ". . . [B]efore a search warrant may validly be issued, there must have been placed before the issuing magistrate sufficient facts to enable him to make an intelligent and independent determination that probable cause exists; . . . while an affidavit may be based on hearsay, there must be sufficient affirmative allegations as to the affiant's personal knowledge or his knowledge concerning his informant, or as to the informant's personal knowledge of the things about which the informant spoke, to provide a rational basis upon which the magistrate can make a judicious determination of probable cause." 200 Kan. at 162.

See State v. *Hubbard*, 215 Kan. 42, 523 P.2d 387.

The point appellant now raises was raised at the suppression hearing before trial. In its ruling on the motion to suppress, the district court stated that if the warrant had been issued on a finding of probable cause, based on material written statements under oath that were later shown to be untrue, items seized should be suppressed. Evidence at the suppression hearing, however, showed the sworn statement was true. Should the items seized be suppressed anyway because hearsay was involved and there was no finding based upon the two-pronged test of *Aguilar*? The district court answered this question in the negative. It reasoned that warrants may be based on hearsay, and where the hearsay statements are true and are of the nature of the statements in this case the evidence seized should not be suppressed. We agree with the district court. The hearsay involved in this case did not affect the magistrate's probable cause determination. Failure to comply with the *Aguilar* requirement does not mandate suppression under the instant facts.

The appellant next contends admitting the holster into evidence was error because the warrant authorized the seizure of only the gun and not the holster.

The search warrant provided in pertinent part:

> ". . . I find there is probable cause to believe that an offense against the laws of the State of Kansas has been committed and that certain items, to-wit: One pearl handled white revolver wrapped with tape on handles. Possibly 38 or 45 caliber with barrel less than 12" in length, in leather holster . . . are contraband or are fruits, instrumentalities, or evidence of such offense. . . ."

The Fourth Amendment to the United States Constitution and Section Fifteen of the Bill of Rights of the Kansas Constitution prohibit warrants except those "particularly describing the place to be searched, and the persons or property to be seized." The purpose of this requirement is to prevent general searches and to prevent the seizure of an item at the discretion of the officer. *Stanford* v. *Texas*, 379 U.S. 476, 13 L.Ed.2d 431, 85 S.Ct. 506. The test is one of practical accuracy rather than one of technical sufficiency, and absolute precision is not required in identifying the property to be seized. *United States* v. *Ventresca*, 380 U.S. 102, 13 L.Ed.2d 684, 85 S.Ct. 741; 3 C. Wright, Federal Practice and Procedure, Criminal, Sec. 670 (1969).

In Mascolo, *Specificity Requirements for Warrants under the Fourth Amendment: Defining the Zone of Privacy*, 73 Dick.L.Rev. 1 (1968), it is said:

> "The courts prefer searches conducted under the authority of warrants to those conducted without benefit thereof.
>
> Therefore, warrants, and their supporting affidavits, are interpreted in a common sense, rather than a hypertechnical, fashion. To do otherwise would

> 'tend to discourage police officers from submitting their evidence to a judicial officer before acting.' Because of the courts' preference for warrants, it is presumed, in the absence of a showing of illegality, that search warrants are valid. This presumption of legality also applies to supporting affidavits, as well as to the proper performance by the issuing magistrate of his official duties. Consequently, one who attacks the validity of a search warrant carries the burden of persuasion." *Id.* at 7-8.

In the case at bar, there was clearly no extension of the search involved in seizing the holster, nor, in our opinion, did the officers seize more than was particularly described in the warrant. The warrant meets the constitutional requirement of "particularity."

The appellant next contends that because of the great number of technical irregularities in connection with the execution and return of the warrant, the warrant should have been quashed and the evidence suppressed. Therefore, admission of the holster and pistol into evidence was error. The appellant enumerates the following technical irregularities: (1) the return was unsigned; (2) the holster was not listed as an item seized; (3) the officer gave the gun to the district attorney without prior authority of the magistrate in violation of K.S.A. 22-2512; (4) no receipt for the items taken was given to the accused or filed with the magistrate in violation of K.S.A. 22-2512; (5) the date on the return was in error.

K.S.A. 22-2511 provides:

> "No search warrant shall be quashed . . . because of technical irregularities not affecting the substantial rights of the accused."

Failure to comply with each of the first four procedural requirements which the appellant lists have been found in various cases not to require suppression of the evidence. *United States* v. *Hall,* 505 F.2d 961 (3rd Cir. 1974) (return unsigned); *Cady* v. *Dombrowski,* 413 U.S. 433, 37 L.Ed.2d 706, 93 S.Ct. 2523 (items seized not listed on return); *State* v. *Stewart,* 219 Kan. 523, 548 P.2d 787 (failure to comply with K.S.A. 22-2512); *People* v. *Canaday,* 49 Ill.2d 416, 275 N.E.2d 356 (1971) (failure to give receipt for items seized). The fifth irregularity—an erroneous date on the return—is a purely technical error which we discount out of hand under the facts of this case. We are cited to no cases and have found none involving as many irregularities as the instant case.

In *State* v. *Stewart,* 219 Kan. 523, 527, 548 P.2d 787, 792, we said:

> "Police officers should comply with the statute [K.S.A. 22-2512] and under certain circumstances their failure to do so might well preclude the admission of seized articles into evidence at the trial. The failure to comply with the statute, however, does not as a matter of law prevent the admission of the seized articles into evidence. . . ."

K.S.A. 22-2511 was adopted verbatim from Ill.Rev.Stat. Ch. 38, Sec. 108-14. Relying on their statute which parallels K.S.A. 22-2511, the Illinois court in *People* v. *Canaday,* 49 Ill.2d 416, 275 N.E.2d 356 (1971) said:

> ". . . [F]ailure to comply . . . with a statutory direction to furnish an inventory of the seized materials will not *in the absence of prejudice* invalidate an otherwise proper search and seizure." 275 N.E.2d at 360. (emphasis added)

In the instant case, the irregularities occurred after a valid search and seizure. Hence, they are not constitutionally significant; the ramification of the procedural violations is governed by the rules of procedure.

Federal Rule of Criminal Procedure 41(d) governs the execution and return of search warrants. Its requirements are similar to those in Article 25 of the Kansas Code of Criminal Procedure. The Third Circuit in *United States* v. *Hall,* supra, was faced with determining the proper remedy for failure to adhere to the procedures of Fed.R.Crim.P. 41(d). Noting the rule did not expressly address remedies which might flow from noncompliance, the court turned to Fed.R.Crim.P. 2 for its interpretive polestar. The language of K.S.A. 22-2103 is identical with Fed.R.Crim.P. 2. We think *Hall's* rationale is persuasive and adopt it.

Article 25 of the Code of Criminal Procedure outlines procedures for the execution of a search warrant, but does not expressly address the remedies, if any, which flow from a failure to adhere to these procedures. We turn to K.S.A. 22-2103 as our guide. K.S.A. 22-2103 expresses values sought to be achieved by the Code of Criminal Procedure. It commands a construction which secures "simplicity in procedure, fairness in administration and the elimination of unjustifiable expense and delay." The manifest intent of the Code is to ensure a just determination of every criminal proceeding.

Applying these guidelines to the issue before us, we do not believe it was intended that every violation of procedures in the Code, however insignificant or inconsequential, should give rise to the suppression remedy. Were that the intent, we think the Code would have specifically

so provided. But we do not believe the Legislature would enact the Code of Criminal Procedure expressly requiring certain actions on the part of the state, and not also intend some remedy to flow from certain violations of the required procedures. We therefore conclude that a warrant should be quashed and evidence suppressed by the district court only when the defendant demonstrates prejudice from a technical irregularity in violation of the rules of procedure governing the execution of search warrants.

The foregoing interpretation furthers the governing intent of the Code—a just determination of every criminal proceeding—and prevents the wholesale opportunity for abuse. Suppression remains a viable remedy where a sufficient showing of prejudice is made—*i.e.*, "prejudice in the sense that it offends concepts of fundamental fairness or due process." *United States* v. *Hall*, supra, at 964.

While we do not condone the procedural violations by law enforcement officers in the instant case, we find the defendant has not demonstrated these technical irregularities resulted in substantial prejudice.

For the reasons as set forth in the foregoing portion of the opinion, we hold the district court did not err in its ruling on the suppression motion and its admission of the pistol and holster into evidence.

The appellant next contends the district court erred in denying his motion for discharge at the close of the state's evidence, and his motion for a directed verdict after the defense had rested its case.

A motion for discharge, a motion for directed verdict and a motion for judgment of acquittal all go to the suffi-

ciency of the evidence to support a conviction. *See State* v. *Gustin*, 212 Kan. 475, 510 P.2d 1290; 23A C.J.S. *Criminal Law*, Sec. 1145(3)(a) (1961). K.S.A. 22-3419 governs motions for judgment of acquittal. The standards for judging the sufficiency of evidence in ruling on a motion for judgment of acquittal were set out in *State* v. *Gustin*, supra. In the instant case, the district court did not err in this respect. *See State* v. *Anderson*, 211 Kan. 148, 505 P.2d 691.

The appellant next contends the state failed to prove beyond a reasonable doubt the allegations set forth in the information. This point really goes to the sufficiency of the evidence. On appellate review, the question is not whether the evidence establishes guilt beyond a reasonable doubt, but whether the evidence was sufficient to form the basis for a reasonable inference of guilt. *State* v. *Wilson*, 220 Kan. 341, 552 P.2d 931. In making this determination, the evidence is viewed in the light most favorable to the state. *State* v. *Motor*, 220 Kan. 99, 551 P.2d 783.

Viewed in the light most favorable to the state, the evidence shows that on September 21, 1973, the appellant and his wife went to Wild Willie's South in Topeka, and looked at guns. The appellant had the clerk lay a gun back for him and left. The appellant called his aunt, Mary Lou Potter, in Holton, and asked that she come to Topeka and buy him a gun. Mary came to Topeka and met the appellant and his wife at Wild Willie's South. The appellant pointed out the gun he wanted and gave Mary the necessary cash. She bought the gun and gave it to him. After purchasing the gun, all went back to Holton in Jackson County—the appellant, his wife and Mary were in the car with the gun. That same day,

the appellant and his wife purchased a holster for the gun at Woolco in Topeka. The belt and holster were too big for the appellant's wife, but fit the appellant. In January and February of 1974, the appellant and his wife lived in Topeka; Dena Christian lived with them. Dena observed the appellant practicing fast-drawing the gun in front of the mirror almost every day. The sights on the gun had been filed down, apparently to facilitate fast-drawing. Dena testified she never saw the appellant's wife handling the gun except when they moved. Dena testified the appellant referred to the gun as his, as did his wife. When Dena and the appellant's wife were living together while the appellant was in jail, Dena never saw his wife handle the gun except when they moved.

The evidence of events after September 21, 1973, was relevant to show the requisite possession of the firearm the appellant exercised on the day it was purchased—*i.e.*, a willful or knowing possession of a firearm with intent to control the use and management thereof. *State* v. *Neal*, 215 Kan. 737, 529 P.2d 114. We have no hesitancy in finding the evidence was sufficient to form the basis for a reasonable inference of guilt.

The appellant next contends the district court erred in denying his *pro se* motion for appointment of a judge *pro tem*.

K.S.A. 20-305 provides that a judge *pro tem* of the district court may be selected when the judge is disqualified to sit. (K.S.A. 20-305 was repealed January 10, 1977 [1976 Kan.Sess.Laws, Ch. 146, Sec. 48].) A judge is disqualified to sit when he is shown to be prejudiced against one of the parties. *In re Peyton*, 12 Kan. 398, *311.

K.S.A. 20-311d provides:

"(*a*) If either party to any action in a district court files an affidavit alleging any of the grounds specified in subsection (*b*) the administrative judge shall at once transfer the action to another division of the court. . . .

"(*b*) Grounds which may be alleged as provided in subsection (*a*) for change of judge are:

. . .

"(5) That the party filing the affidavit has cause to believe and does believe that on account of the personal bias, prejudice, or interest of the judge he cannot obtain a fair and impartial trial. Such affidavit shall state the facts and the reasons for the belief that bias, prejudice or an interest exists."

K.S.A. 20-311f provides in pertinent part:

> ". . . [A] party shall have seven (7) days after pretrial, or after receipt of written notice of the judge to which the case is assigned or before whom the case is to be heard, whichever is later, in which the affidavit may be filed."

On January 30, 1975, the appellant filed a *pro se* motion for appointment of a judge *pro tem* pursuant to K.S.A. 20-305. On January 31, 1975, a motion by the appellant through his appointed counsel was filed pursuant to K.S.A. 20-311d for the disqualification of The Honorable Adrian J. Allen, judge of the fourth division of the district court of Shawnee County before whom the case was to be tried. The administrative judge transferred the latter motion to Judge William R. Carpenter of the first division for hearing and determination. On February 3, 1975, the

morning scheduled for the start of the appellant's trial, Judge Carpenter heard arguments on the motion for disqualification of Judge Allen and denied the motion because it was untimely filed under K.S.A. 20-311f. Judge Carpenter filed his written decision on the motion on the afternoon of February 3, 1975; thereafter, Judge Allen denied the appellant's *pro se* motion for judge *pro tem* and the trial commenced. Judge Allen stated:

> "Let the record show that the minutes reflect that Judge Carpenter heard an application for disqualification of myself today to hear this case which was denied, and accordingly the Court feels that the motion for a *pro tem* should also be denied."

The appellant concedes Judge Carpenter properly overruled the motion for disqualification because it was untimely filed, but argues the time limits in K.S.A. 20-311f cannot apply to a motion for a judge *pro tem* under K.S.A. 20-305. Consequently, it was error for Judge Allen to rely on Judge Carpenter's ruling on procedural grounds. The appellant argues his *pro se* motion should have been determined on the merits by a judge other than Judge Allen. The appellant's point is not well taken.

A party who shows a judge is prejudiced against him has a right to have his case tried before some other judge—either a judge in some other division or district, or a judge *pro tem*. *In re Peyton*, supra. The first step in getting a new judge, *pro tem* or otherwise, is to show prejudice. K.S.A. 20-311d sets out the procedures for this determination. Only after a finding of prejudice under the procedures of K.S.A. 20-311d would the provisions for appointment of a judge *pro tem* under K.S.A. 20-305 come into play. To allow a movant for disqualification

of a judge barred by the time limitations of K.S.A. 20-311f to proceed under K.S.A. 20-305 regardless of time, would circumvent the procedures for disqualification of a judge.

K.S.A. 20-311f was a procedural bar to both the motion for disqualification and the *pro se* motion for appointment of a judge *pro tem*. The district court properly did not rule on the merits of either motion; neither will this court reach the merits of either motion on appeal.

The appellant's next two points will be considered together. The appellant contends he was denied the right to have compulsory process for obtaining witnesses in his favor in contravention of the Sixth Amendment of the United States Constitution and Section Ten of the Bill of Rights of the Kansas Constitution when the district court ruled his court-appointed attorney had the sole power to decide who would testify in the appellant's behalf. The appellant further contends this denial of compulsory process together with the court-sanctioned refusal of his attorney to present the appellant's desired defenses constituted violations of rights that are necessarily *implied* from the Sixth Amendment and Section Ten of the Kansas Bill of Rights—*i.e.*, the right to assist in his own defense.

It is quite clear from the record that the appellant and his appointed counsel disagreed from the outset as to what witnesses should be called and how the defense should be presented. The appellant wanted to go into areas in his defense strategy that his counsel thought were collateral and irrelevant. The appellant filed a *pro se* motion directing that some fourteen witnesses be subpoenaed. The appellant apparently wanted several of these witnesses to present his theory of the defense. The judge

ruled that while the appellant had the right to compulsory process, the ultimate decision on which witnesses would be subpoenaed was for his counsel as were other matters of trial strategy. Appellant's counsel talked to the witnesses and knew what they would say; he called only those witnesses which, in his opinion, were pertinent to the defense.

There was also some dispute as to the degree of appellant's participation in his defense. The appellant was recognized as co-counsel at his arraignment. During the course of the proceedings below, he filed a plethora of *pro se* motions. He was allowed to argue some of these *pro se* motions at both pretrial and post-trial hearings. At trial, the appellant wanted not only to direct the course of his defense strategy, but also wished to take part in jury selection and wanted the right to have certain questions asked of witnesses. The appellant was not allowed to so participate at the trial. Conduct of the trial was entirely under the control of appointed counsel, although he did listen to the appellant's suggestions.

The appellant repeatedly stated he wanted appointed counsel. He also wanted the right to conduct his own defense. On October 10, 1974, the appellant's first court-appointed counsel was allowed to withdraw, and another attorney was appointed. It is not clear from the record why the appellant wanted the change. The court allowed the change because both counsel and the appellant agreed to it. When it became apparent that his second appointed counsel would not call all the witnesses the appellant desired or present his theory of the defense, the appellant asked the court to dismiss him and appoint a third counsel. The court advised the appellant he had the right to defend

himself or to have appointed counsel. The appellant wanted counsel, and the court refused to make another change.

In *Faretta* v. *California,* 422 U.S. 806, 45 L.Ed.2d 562, 95 S.Ct. 2525, the United States Supreme Court held that the Sixth Amendment, as made applicable to the states by the Fourteenth Amendment, guarantees that a defendant in a state criminal trial has an independent constitutional right of self-representation in that he may proceed to defend himself without counsel when he voluntarily and intelligently elects to do so. The opinion states:

> "The Sixth Amendment does not provide merely that a defense shall be made for the accused; it grants to the accused personally the right to make his defense. It is the accused, not counsel, who must . . . be accorded 'compulsory process for obtaining witnesses in his favor.' Although not stated in the Amendment in so many words, the right to self-representation—to make one's own defense personally—is thus necessarily implied by the structure of the Amendment. The right to defend is given directly to the accused; for it is he who suffers the consequences if the defense fails." 422 U.S. 819-20.

The appellant relies on *Faretta* for the proposition that he had a constitutional right to dictate what witnesses would be called and to participate in his own defense. We disagree.

Prior to *Faretta,* federal courts held that a party had a right to represent himself or to be represented by counsel, but did not have the right to hybrid representation. *United States* v. *Hill,* 526 F.2d 1019, 1024 (10th Cir. 1975). *Faretta* ratified a consensus within the federal judiciary

favoring a constitutional right to *pro se* representation. *United States* v. *Swinton*, 400 F.Supp. 805 (S.D.N.Y. 1975). *Faretta* did not alter the established rules concerning hybrid representation. *United States* v. *Hill*, supra. *See United States* v. *Bennett*, 539 F.2d 45 (10th Cir. 1976); *United States* v. *Williams*, 534 F.2d 119, 123 (8th Cir. 1976). An indigent accused has a right to either appointed counsel or *pro se* representation, but both rights cannot simultaneously be asserted. *See United States* v. *Williams*, supra; *United States* v. *Swinton*, supra; *People* v. *Morris*, 12 Mich.App. 411, 163 N.W.2d 16 (1968). A defendant who accepts counsel has no right to conduct his own trial or dictate the procedural course of his representation by counsel. *See Rogers* v. *United States*, 325 F.2d 485, 488 (10th Cir. 1963); *People* v. *LaMarr*, 1 Mich.App. 389, 136 N.W.2d 708 (1965).

The *Faretta* decision recognized that the defendant could either represent himself or be represented by counsel:

> ". . . It is true that when a defendant chooses to have a lawyer manage and present his case, law and tradition may allocate to the counsel the power to make binding decisions of trial strategy in many areas. (citations omitted) This allocation can only be justified, however, by the defendant's consent, at the outset, to accept counsel as his representative. An unwanted counsel 'represents' the defendant only through a tenuous and unacceptable legal fiction. Unless the accused has acquiesced in such representation, the defense presented is not the defense guaranteed him by the Constitution, for, in a very real sense, it is not *his* defense." 422 U.S. at 820-21.

There is no question appellant wanted appointed counsel, but he did not want to be bound by the decisions of counsel. Our holding in *Winter* v. *State*, 210 Kan. 597, 502 P.2d 733, is apropos:

> "In the control and direction of a criminal case certain decisions relating to the conduct of the case are ultimately for the accused and others are ultimately for defense counsel. The decisions which are to be made by the accused after full consultation with counsel are: (1) what plea to enter; (2) whether to waive jury trial; and (3) whether to testify in his own behalf." (Syl. 1)
>
> "In the conduct of the defense of a criminal case the technical and professional decisions, which require trained professional skill and judgment, must rest with the lawyer. The decisions on what witnesses to call, whether and how to conduct cross-examination, what jurors to accept or strike, what trial motions should be made, and all other strategic and tactical decisions are the exclusive province of the lawyer after consultation with his client." (Syl. 2)

Although the appellant was recognized as co-counsel, his right to participate with counsel in the conduct of his defense was still within the sound discretion of the district court. *United States* v. *Swinton*, supra, at 806; *Fowler* v. *State*, 512 P.2d 238 (Okla. Crim. App. 1973); *see State* v. *Kelly*, 210 Kan. 192, 499 P.2d 1040. We would also note that an indigent criminal defendant may not demand a different appointed counsel except for good cause, and it is within the sound discretion of the district court to decide whether the dissatisfaction of an indigent accused with his court-appointed counsel warrants dis-

charge of that counsel and appointment of new counsel. *State* v. *Banks,* 216 Kan. 390, 532 P.2d 1058.

We hold that, under the facts of the instant case, the appellant's right to compulsory process was not abridged, and the district court did not abuse its discretion in limiting the appellant's participation in his defense or in denying his request for change of appointed counsel.

The appellant next contends the district court erred in denying his motion for an order designating the Menninger Foundation to conduct a psychiatric examination of him in order to aid the court in determining whether he was, prior to the rendition of the judgment and during his trial, incompetent to stand trial as defined in K.S.A. 22-3301(1)(*b*).

Shortly after trial, the appellant's court-appointed counsel was allowed to withdraw and yet another counsel was appointed as a result of allegations of ineffective assistance of counsel in the appellant's *pro se* motion for a new trial. Two months after trial, the new appointed counsel filed a motion to determine the appellant's competency to stand trial. A psychiatrist with the Shawnee County Court Clinic was directed to examine the appellant concerning his competency. At the hearing on the motion on June 3, 1975, the psychiatrist testified his examination was inconclusive. After he testified, the appellant went into a tirade and was twice found in contempt. The psychiatrist took the stand again and testified concerning the appellant's conduct he had just observed. Based primarily upon this testimony, the district court found the appellant was unable to understand the nature of the proceedings against him or to make or assist in making his defense. The court ordered him committed to the state security

hospital at Larned for a period not to exceed six months. On July 1, 1975, Larned submitted a report to the district court; a hearing was held on July 25, 1975, and, based on the Larned report, the court found the appellant was competent to stand trial, and ordered suspended proceedings on motions, including motions for new trial, be resumed. Thereafter, appellant's counsel filed a motion requesting the court to designate the Menninger Foundation to conduct a further psychiatric examination of the appellant to determine whether he was competent at the time of trial. The district court heard arguments on the motion, took it under advisement and, on August 25, 1975, denied it.

The district court's ruling appears to have been based on doctor's reports and upon the court's own observation of the appellant during trial and at numerous other court appearances. The court had before it psychiatric evaluations of the appellant made two and a half years before, six months before and five months after the trial, all of which indicated the appellant was competent to stand trial. The first report by the Shawnee County Court Clinic psychiatrist, filed some three months after trial, was inconclusive. Only the psychiatrist's report based entirely on his observations at the hearing on June 3, 1975, indicated the appellant was incompetent to stand trial. The district court noted that the appellant's conduct had been observed at various stages in pretrial and trial proceedings by two public defenders, by various members of the district attorney's office and by several judges, none of whom questioned his competency based upon personal observation. We do not find the district court abused its discretion in denying the motion for a further psychiatric examination by the Menninger Foundation or in finding the appellant

was competent to stand trial at the time of trial. *See Johnson* v. *State*, 208 Kan. 862, Syl. 1, 494 P.2d 1078; *State* v. *Ridge*, 208 Kan. 236, Syl. 3, 491 P.2d 900; *State* v. *Kelly*, 192 Kan. 641, 391 P.2d 123.

The appellant next contends the district court erred in sentencing him pursuant to the Habitual Criminal Act (K.S.A. 21-4504). The appellant argues the judgment of conviction relied upon by the state in invoking the statute should have been presumed void because the journal entry was ambiguous as to whether counsel was present at the time of sentencing, and in view of the appellant's testimony he had no counsel at the time of sentencing.

The district court found that counsel was present at sentencing and that the Florida conviction could properly be used for purposes of the Habitual Criminal Act. We have no dispute with this finding. The Florida journal entry appears in the record and from our reading it is not ambiguous. It indicates counsel was present at the time of sentencing. The district court apparently did not believe the appellant's testimony that no counsel was present. It is not the function of the Supreme Court to reweigh the evidence or pass on the credibility of testimony. *State* v. *Duke*, 205 Kan. 37, 468 P.2d 132. The district court did not err in invoking the Habitual Criminal Act pursuant to K.S.A. 21-4504.

The appellant raised other points which do not merit discussion. We have carefully considered each and find no error. Points fifteen through nineteen in the appellant's statement of points are considered abandoned, having been neither briefed nor argued on appeal. *State* v. *Piland*, 217 Kan. 689, 538 P.2d 666.

The judgment is affirmed.